United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: December 8, 1997

Case No. **96 INA 345**

In the Matter of:

PRESTIGE JANITORIAL,
Employer

on behalf of

FELIX FRANCO,
Alien

Appearance: A. A. Kingston, Esq., of Santa Barbara, California

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of FELIX FRANCO (Alien) by PRESTIGE JANITORIAL (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at San Francisco, California, denied this application, the Employer requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General (1) that there are not sufficient workers who are able, willing, qualified, and available at the place where the alien is to perform such labor at the time of the application; and (2) that the employment of the alien will not

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability at that time and place.[2]

STATEMENT OF THE CASE

The Employer, which provides janitorial and truck mounted carpet cleaning services, applied for labor certification on behalf of the Alien on April 21, 1994, to fill the position of Maintenance Mechanic. AF 45. The Employer described the duties of the Job to be Performed as follows:

> Repairs and maintains janitorial services company's fleet of truck-mounted carpet-cleaning machines. Performs maintenance on fleet of truck-mounted carpet-cleaning machines, free-standing steam cleaners, shampooers, and vacuums, waxers, etc. Repairs or replaces defective parts as necessary. Sets up and follows preventative maintenance schedule.

Employer offered $9.50 an hour for this forty hour a week position, plus $14.25 per hour for overtime. The Job required a high school education plus two years of experience in the job offered. The position was classified pursuant to DOT Code No. 638.281-014 under the Occupational Title of Maintenance Mechanic. AF 45. Although five U. S. workers applied for the position that was advertised, the Employer rejected all of them. AF 50-51.

Notice of Findings. The Notice of Findings (NOF) of September 25, 1995, advised Employer that the Certifying Officer would deny certification, subject to rebuttal. AF 40-43. The CO found the wage offered was more than 5% below the prevailing wage applicable to this occupation at time and place where the job was offered.

The CO said Employer's wage offer of $9.50 per hour was more than 5% below the prevailing wage of $15.69 per hour, as determined by the local Employment Service agency under 20 CFR §§ 656. 21(e) and 656.40(a)(2)(i). By offering a salary below the prevailing rate of pay, the CO found that Employer violated 20

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

CFR §§ 656.20(c)(2), 656.20(g), and 656.21(g)(4). The CO then observed that the State Employment Service agency duly advised the Employer in writing to increase the amount offered to the correct minimum level on September 5, 1994, and September 30, 1994, and that on September 12, 1994, and October 11, 1994, the Employer had formally refused to amend its wage offer and had chosen to rebut the prevailing wage finding. AF 41-42, 49, 89-92.

The CO said Employer could now amend its application by increasing the wage offer to at least $14.91, an amount within 5% of the prevailing rate of $15.69 per hour and retest the labor market at the prevailing wage amount, or it could submit a rebuttal for review under 20 CFR §§ 656.40 and 656.50.[3] AF 40-43.

Rebuttal. Employer's December 4, 1995, Rebuttal included a cover letter from Employer's counsel; the September 1, 1994, wage survey under DOT No. 638.261-014, Maintenance Mechanic, for Los Angeles County by the State Employment Service agency (EDD); and an undated "independent wage survey" putatively conducted on an unknown date by an unidentified person who apparently telephoned six employers who reported concerning seven employees in and around Palmdale and Lancaster California.

Employer's Rebuttal then urged the CO to reject the EDD survey of September 1, 1994, as contrary to a "directive of the U. S. Department of Labor."[4] Employer further asserted that the EDD survey was flawed and otherwise defective because it used "obviously inaccurate data." Without stating just what it meant by "obviously inaccurate data" or describing the provenance of this "independent wage survey," the Employer said it reflected a prevailing wage equal to $8.34 per hour which, Employer asserted, was more accurate than the EDD September 1, 1994, survey. AF 23-24.[5]

Final Determination. The Final Determination issued by the CO on January 19, 1996, denied certification on grounds that the Employer had failed to rebut the finding as to the prevailing wage. AF 19-21. The CO found that the Employer's recruitment was unlawful in that it failed to offer the job at the prevailing

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[3]20 CFR § 656.50 has been recodified as 20 CFR § 656.3.

[4]The Employer later suggested that this reference was to the ETA publication, "Employment Service Program Letter No. 15-95" (dated July 14, 1995), pp. 26-27. AF 24.

[5]Although Employer rejected forthwith EDD's first request to amend its wage offer on September 5, 1994, Employer did not inquire as to the accuracy of the September 1, 1994, survey until October 3, 1995, when it was preparing its Rebuttal of the CO's NOF prevailing wage finding of facts based on that EDD survey. AF 34-39, and see AF 20 for a summary of these events.

wage rate within the meaning of 20 CFR §§ 656.21(b)(1)(i)(A), and (e), and § 656.40. AF 20-21. While noting that the Employer had objected to the EDD survey on grounds that it encompassed the entire County of Los Angeles, the CO concluded that Employer's survey was unacceptable because the sample size was too small for accuracy. The CO further found that the EDD wage survey for Maintenance Mechanic covered eleven employees and twenty-six employers, and encompassed the entire County of Los Angeles because EDD had found that, if it used a smaller survey area, the sample size would be too small.

Appeal. On February 16, 1996, the Employer appealed to BALCA to review and evaluate its rebuttal and the denial of certification, contending that its own survey was more accurate than the EDD wage survey, which it alleged was flawed. AF 01-03.

DISCUSSION

The disputed issue arises under 20 CFR § 656.20(c)(2), which requires employer to offer a wage that equals or exceeds the prevailing wage determined under 20 CFR § 656.40, a regulation which provides that the prevailing wage for occupations that are not subject to the Davis-Bacon Act or the Service Contract Act must be the average wage paid to workers similarly employed in the area of intended employment.[6]

It is a well settled rule of general application that an employer seeking the benefit of a special provision of the Immigration and Nationality Act under which a foreign worker is to be certified to take a job within the United States has the burden of proof when it appeals from a Certifying Officer's denial of certification. **Cathay Carpet Mills, Inc., d/b/a The Walnut Company,** 87 INA 161 (Dec.7, 1988) (en banc). For this reasons, an employer challenging the CO's determination of the prevailing wage "bears the burden of establishing both that the Certifying Officer's wage determination is in error, and that the Employer's wage offer equals or exceeds the correct prevailing wage." **William Flint Painting & Cleaning Company,** 90 INA 256 (Dec. 9, 1992), slip op at 4.[7]

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[6]For the purposes of 20 CFR § 656.40(b)(2) the phrase "similarly employed" refers to workers who have substantially comparable jobs in the occupational category in the area of intended employment.

[7]Also see **PPX Enterprises, Inc.,** 88 INA 025 (May 31, 1989)(en banc). This obligation, however, is based on the premise that the Employer, on its request, has been made aware of the source for and basis of the CO's determination. **John Lehne & Son,** 89 INA 267 (May 1, 1992)(en banc); **William Flint,** supra. This Employer was made aware of the background of the CO's finding of the applicable prevailing wage in this case.

This Employer's challenge is based entirely on its contention that the data developed in its own survey is more accurate for a reasonable comparison of the wage rates being paid to workers who are employed in an area that is comparable to the area of intended employment. The area of intended employment is

> the area within normal commuting distance of the place (address) if intended employment. It the place of intended employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance of the place of intended employment.

20 CFR § 656.3.[8] As the CO was required to consider Employer's argument that the prevailing wage used was not applicable to the area of intended employment in this case, it is found that the NOF and the Final Determination demonstrate that the CO carefully considered that argument in this case. **Peddinghaus Corp.**, 88 INA 079 (July 6, 1988).

When challenging the CO's prevailing wage determination the Employer's burden of proof requires it to establish both (1) that the CO's determination is in error and (2) that the employer's wage offer is at or above the correct prevailing wage. **PPX Enterprises, Inc.**, 88 INA 025 (May 31, 1989)(en banc).[9] As the Board has affirmed the CO's denial of labor certification where the employer failed to submit its own wage survey in **Tse Yu Chun, M.D.**, 90 INA 413 (Nov. 19, 1991), an employer challenging a CO's prevailing wage determination must state a basis for believing that its own wage represents the actual prevailing wage. **Altra Filter, Inc.,** 90 INA 015 (Dec. 7, 1990). Consequently, in this case the Employer must establish that its own wage survey is relevant and accurate. **F. L. Tarantino & Sons Quakertown Memorials**, 90 INA 231 (June 13, 1991).

As described in its Rebuttal, however, the Employer's wage survey was undated and it was conducted on one or more dates that were not disclosed by a person or person whose identity is not revealed. While an attorney's evidence may be competent in matters of which he has firsthand knowledge, no reason is given to infer that this was the case in this instance. **Moda Lines, Inc.**, 90 INA 424 (Dec. 11, 1991); and see **Modular Container**

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[8]An MSA was authoritatively defined as, "a county or group of contiguous counties which contain at least one central city of at least 50,000 inhabitants or a central urbanized area of at least 100,000. Counties contiguous to the one containing such a city or area are included in an MSA if, according to certain criteria, they are essentially metropolitan in character and are socially and economically integrated with the central city." **Seibel & Stern**, 90 INA 086, (Apr. 26, 1990).

[9]Also see Sun Valley Co., 90 INA 391 (Jan. 6, 1992).

Systems, Inc., 89 INA 228 (July 16, 1991)(en banc). It follows that the credibility of the survey by this Employer is open to question. Moreover, the major assertions of fact describing the MSA where this application is to be weighed and discussing the nature and staffing of the various employers with whom Employer's salary offer is to be compared are all found counsel's brief, and they are not stated in any other place in this record. As a result, it is germane that the putative facts Employer's counsel assumed are inextricably interwoven with the arguments in his brief. For these reasons the assumptions of fact in Employer's behalf are not credible, including the facts on which Employer based the representation in the wage survey alleged in its Rebuttal and its brief.

As the Employer must establish both the error in the CO's determination and the amount of the employer's wage offer at or above the correct prevailing wage under the holding in **PPX Enterprises, Inc.**, (supra), it is concluded that sufficient evidence supported the CO's finding that the Employer had failed to sustain its burden of proof.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.